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Getting Jurors to Awesome

Cortney E. Lollar^{FN1}

A 2011 American Bar Association report on the death penalty in Kentucky revealed that a shocking two-thirds of the 78 people^{FN2} sentenced to death in Kentucky since reinstatement of the death penalty in 1976 have had their sentences overturned on appeal. Kentucky's reversal rate is more than twice the national average, with a 31% reversal rate in capital cases and almost four times the 17% national reversal rate in all other case types.^{FN3} With a sentence as irreversible as death, troubling does not begin to describe the depth of concern many experience when viewing such a startling statistic.

A closer look at the cases behind this extreme reversal rate reveals some surprising patterns. Two of the more consistent factors leading to the reversal of death sentences in Kentucky are prosecutorial comments, which lead the jury to feel a diminished sense of responsibility in their ultimate sentencing decision, and jury instruction error. This essay focuses on the former, the minimization of the jury's sense of responsibility, a factor in 12% of reversals.^{FN4} However, jury instructions are intimately intertwined with how the jury navigates and perceives their role. Accordingly, this essay will also discuss how aggravating and mitigating jury instructions play a role in minimizing the jury's function, as well. Furthermore, this essay explores whether the concerns related to the minimization of a juror's role are confirmed by empirical evidence, and concludes by suggesting ways to help jurors acknowledge the full weight of their responsibility in the event the death penalty continues to be a punishment in Kentucky.

The Jury's Discomfort with Its Role in Capital Sentencing

The jury's role in sentencing is rooted in Supreme Court jurisprudence that re-establishes the constitutionality of the death penalty in the mid-1970s. Under the scheme permitted by the Supreme Court in *Gregg v. Georgia*, a case which led many states to reinstate the death penalty, the Court approved of a bifurcated trial where juries are given "guided discretion" in their decision at the penalty phase of a capital trial.^{FN5} Specifically, the framework authorized by the Court instructed the jury to look at certain statutory and non-statutory aggravating and mitigating factors in determining the appropriate punishment.^{FN6} The Court viewed the jury's role as central to the decision, calling the jury a "significant and reliable objective index of contemporary values because it is so directly involved [in the proceedings]."^{FN7}

Yet many jurors, both then and now, remain quite uncomfortable with the role delineated for them in *Gregg*. As one scholar has suggested, "many death penalty jurors who are confronted with the anguishing moral dilemma of a death sentencing decision seek to avoid the perception that they bear personal moral responsibility for making that decision."^{FN8} In large part, this avoidance is likely because "[c]apital trials are unique in American jurisprudence and, indeed, in human experience. Under no other circumstance does a group of ordinary citizens calmly and rationally contemplate taking the life of another, all the while acting under color of law."^{FN9} Generally, individuals seek to avoid being in a position to make the decision as to whether another person lives or dies. Yet, in this context, jurors are asked to put their normal aversion aside and decide the ultimate fate of another.

In order to eliminate some of the uneasiness they may feel, jurors may try to distance themselves

from the decision. It is therefore not surprising that attorneys trying to persuade a juror to sentence someone to death might identify and utilize this discomfort. After *Gregg*, prosecutors around the country, including those in Kentucky, often attempted to alleviate juror distress by convincing them that their decision was not the final one, thereby allowing them to be more comfortable imposing a death sentence.

As indicated by the number of reversals in Kentucky on this ground, courts, including the Supreme Court, did not embrace this approach. In a 1985 case, *Caldwell v. Mississippi*, the Supreme Court found it “constitutionally impermissible to rest a death sentence on a determination made by a sentencer who [had] been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”[FN10](#)

In *Caldwell*, Bobby Caldwell was sentenced to death in Mississippi for shooting and killing the owner of a small grocery store during the course of robbing the store.[FN11](#) During the initial sentencing proceeding, Caldwell’s attorney asked the jury to show mercy, saying:

[E]very life is precious and as long as there’s life in the soul of a person, there is hope . . . [D]eath is final. So I implore you to think deeply about this matter . . . I’m sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It’s going to be your decision . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know – an awesome responsibility.[FN12](#)

The prosecutor responded to defense counsel’s notion by minimizing the jury’s role in sentencing, stating: “[T]hey would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable . . . [T]he decision you render is automatically reviewable by the Supreme Court. Automatically . . .”[FN13](#)

In rejecting the government’s argument, the Supreme Court confirmed its belief that capital juries would “view their task as the serious one of determining whether a specific human being should die at the hands of the State.”[FN14](#) In fact, Caldwell’s counsel was echoing the precise words of Justice Harlan, who, in a previous case, identified the jury’s “awesome responsibility” in capital cases.[FN15](#)

In *Caldwell*, Justice Marshall embraced the idea that a sense of moral responsibility not only would affect, but also *should* affect a jury’s decision in deciding what sentence to impose.[FN16](#) The Court envisioned this model of jury service as essential to the death penalty’s continued constitutionality under the Eighth Amendment.[FN17](#) According to the Court, the jury should contemplate the individuality of a defendant and whether this particular individual should be given or denied mercy in making its sentencing decision.[FN18](#) In fact, the Court premised its acceptance of capital punishment on jurors not evading the mantle of the responsibility vested in them.[FN19](#)

Although the *Caldwell* Court reiterated its confidence in jurors taking their role as life or death decision-maker quite seriously, it simultaneously acknowledged the real discomfort many capital jurors feel about making that ultimate decision. According to the Court, capital juries are “made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community.”[FN20](#) As a result, the Court continued, “[I]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences,”[FN21](#) especially when jurors are

encouraged to view their role in determining someone's fate as something less momentous than it actually is. Justice Marshall's opinion recognizes how effortlessly jurors could abandon the weighty sense of moral responsibility, and rejects any attempts to keep the jury from being aware of the true consequences of its decision during the penalty process.

A Closer Look at the Assumptions Underlying Caldwell

The *Caldwell* Court's endorsement of jurors as the moral compass for the community and admonition of the government for trying to minimize juror's acceptance of this role, builds on a central, unexamined premise. The Court assumes a reduced sense of responsibility will affect a jury's decision. More specifically, it presumes that minimizing a jury's role will reduce the sense of responsibility the jury feels.^{FN22} If jurors are torn about imposing a death sentence, the Court reasons, the knowledge of judicial or appellate review might allow them to more readily invoke the death sentence. Jurors assume that a court will be the ultimate arbiter, with the result being a less reliable decision.^{FN23} Conversely, a sentencer who believes that she alone is responsible for the defendant's fate will take her moral obligations more seriously, thus resulting in a more reliable decision.

At the time *Caldwell* was decided, there was little evidence, empirical or otherwise, to support or refute the Court's claim. As a result, notwithstanding the Court's holding, questions remained as to whether a reduced sense of responsibility actually affected a jury's decision. Additional questions remained as to whether comments suggesting that courts would review and revise a jury's finding would reduce how a juror viewed their responsibility in imposing death.

In light of the high reversal rate in capital cases in Kentucky on this minimization ground, both before and after *Caldwell*, these questions seem important to answer. The next section looks at both the empirical evidence and the theoretical underpinnings supporting the Court's view.

Empirical Evidence on Minimization of the Jury's Role

Since *Caldwell*, several empirical studies have examined the question of whether a reduced sense of responsibility affects a jury's decision, separate from any comments by prosecutors or judges attempting to minimize the jury's role. The results support *Caldwell*'s holding and the legitimacy of Kentucky's reversals on this basis.

Many former capital jurors who were interviewed indicated that they see the defendant, the law, or the court as primarily responsible for the outcome of a capital sentencing^{FN24} rather than acknowledging their own role in the decision.^{FN25} Numerous studies have shown that capital jurors believe the person most responsible for the punishment is the defendant himself, viewing it as the inevitable result of the defendant's crime.^{FN26} These same jurors also tend to believe the law commands a particular sentence, making the decision one that is out of their hands.^{FN27} In fact, eight out of ten former capital jurors interviewed feel the defendant or the law is most responsible for a defendant's punishment.^{FN28} Although these jurors consider "the law" to be what statutes command, studies also suggest that a majority of jurors believe the defendant's fate is actually up to the judge and appeals court.^{FN29} Even without prosecutors giving their imprimatur to this view, jurors tend to take judicial review and ultimate decision-making as a given.^{FN30}

Troublingly, only a small minority of capital jurors believes they, either individually or collectively as a jury, bear the responsibility for a defendant's punishment.^{FN31} As a result, one study revealed that

jurors in 75% of the capital trials reviewed found no need to deliberate in the penalty phase, indicating that the law took responsibility away from them.FN32[32] Although, technically speaking, the jury *is* solely tasked with recommending a sentence to the judge, the law on this issue is not quite so simple.

It is true that under Kentucky law, jurors recommend a sentence to the judge,FN33 and indeed, state law requires Kentucky Supreme Court review of a capital sentence.FN34 In the strictest sense, then, neither prosecutors nor judges are misstating the law by telling jurors that their role is to “recommend” a sentence to a judge, who ultimately makes the final sentencing decision. Subsequent federal appellate decisions have confirmed that such a statement, in and of itself, is not error.FN35

Yet, that is not the whole story. Kentucky allows a judge to impose a death sentence only if the jury votes for death. The jury alone determines which aggravating circumstances authorize a death sentence.FN36 Of the thirty-two states with the death penalty, only three permit judges to override life verdicts issued by jury recommendation, and Kentucky is not one of them.FN37 Although it is difficult to get the numbers,FN38 evidence suggests that judges rarely override a death sentence in favor of a life sentence.FN39 In the instances when they do, “[b]y far the most common reason for judicial overrides of death recommendations is the defendant’s mental illness or mental retardation.”FN40 Additionally, judges seem to override jury death verdicts when there is a likelihood that the decision will get overturned on appeal.FN41 Thus, juries really do play the most critical role in determining whether a defendant receives a sentence of death, as it is almost always their recommendation that makes the ultimate call.

Caldwell is still good law, and several Kentucky Supreme Court opinions have continued to give teeth to its holding, despite the statute’s use of the word “recommend.”FN42 In *Bussell v. Commonwealth*, for example, the Court remarked, “[t]his Court has repeatedly denounced the use of the term ‘recommend,’ despite the fact that it appears in the sentencing statute.”FN43 Similarly, in an unreported 2007 case, the Court admonished a prosecutor for telling the jury, “I’m the one who may have to recommend that he die. I’m the one who is responsible; well, you are not responsible.”FN44 Although the Court reversed the sentence on other grounds, it took pains to reiterate “any actions by the Commonwealth which would tend to lessen in the minds of the jury their awesome responsibility” must be discouraged and should not be repeated on retrial.FN45

The law in Kentucky continues to be what the Kentucky Supreme Court articulated in its 1988 *Grooms v. Commonwealth* opinion:

[T]he instructions on the penalty phase should require the jury to fix the punishment. As a matter of law, the punishment fixed by the jury shall be considered to be a recommendation by the jury to the trial judge, who will then have the ultimate responsibility of fixing the penalty as prescribed by statute.FN46

The standard jury instruction reflects this understanding, explaining to the jury: “[y]ou [have now received] additional evidence from which you shall determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, following which you shall fix a sentence for the Defendant.”^{FN47} Thus, while the jury *is* solely tasked with recommending a sentence to the judge, because of the critical role jurors play in determining that sentence, jurors are to be told they are fixing the punishment.

There are some scenarios where concern about capital jurors trying to avoid their responsibility for a defendant’s ultimate sentence arises more regularly. When jurors believe the defendant killed under the influence of extreme mental or emotional disturbance, they tend to assign a greater role to the judge in determining the penalty.^{FN48} Jurors also are less willing to accept responsibility when female defendants are sentenced than males.^{FN49} Jurors who are active in politics also tend to shift responsibility to the judge, where as those for whom religion influenced their sentencing decision tended to accept a greater share of responsibility.^{FN50}

By way of contrast, there are other scenarios in which former capital jurors are more willing to be held accountable for their role in a defendant’s sentence. “Jurors report a greater sense of responsibility when the vicious or brutal nature of the killing played a role in their decision-making.”^{FN51} Similarly, “jurors accepted increased responsibility if they believed the defendant had planned or intended to kill the victim, even if [the defendant] was not the [person to actually commit the act].”^{FN52}

At least one study has shown that a correlation exists between rejection of responsibility at capital sentencing and a decision to sentence a defendant to death.^{FN53} Believing the decision would ultimately be the court’s made it easier for jurors to impose the death penalty.^{FN54} In other words, jurors who assign sentencing responsibility elsewhere are somewhat more likely to impose death, just as the *Caldwell* Court presumed.

Jurors Seek to Minimize Their Role

Separate from jurors’ beliefs that the defendant, the law, or the court are the ultimate arbiter of a capital defendant’s fate, many jurors also seek other methods of downplaying their own significance. Numerous studies have shown that capital jurors distance themselves from responsibility from their sentencing decisions.^{FN55} Consistent with the *Caldwell* Court’s fears, capital jurors often “focus solely on the portion of the judge’s sentencing instructions that tells them they are only making a recommendation in order to absolve themselves of responsibility.”^{FN56} Again, such a result is not surprising. As one commentator noted, “jurors are predisposed to use almost *any* available information to downplay their responsibility for the death sentencing decision.”^{FN57}

Common Juror Misinformation and Misunderstandings

Many jurors rely on common lore and misinformation learned outside the courtroom in making their decisions in a capital case. One common misperception is that if a jury does not vote for death, a dangerous defendant will be walking the streets in a short period of time. The possibility of parole in a case where the jury imposes death weighed heavily on jurors, and often was a major consideration in their decision to impose the death penalty.^{FN58} In a recent survey of former Kentucky capital jurors by Professor Marla Sandys, jurors erroneously believed that if they did not impose the death penalty, convicted defendants would be back on the street in ten years.^{FN59} A death sentence becomes insurance against the possibility of a return to society.^{FN60} Thus, these same jurors appear

to assume that at least if they impose death, the offender will not be back in the community any time soon, even if the execution is not carried out. Jurors also have significant doubts that most death sentences will be carried out.^{FN61} As a result, jurors vote for death to “send a message,” in the words of the *Caldwell* Court,^{FN62} as to how serious and heinous they view the defendant’s crime.

Confusing and unclear jury instructions also play a significant role in jurors’ capital decisions. Part of the expectation for jurors, as articulated in *Caldwell*, is that they will evaluate mitigating evidence that might justify exercising mercy as part of their moral responsibility in death penalty cases. But, it is not uncommon for courts to improperly instruct jurors on what is required for aggravation and mitigation or to give instructions that jurors find confusing.^{FN63} Because the instructions are not clear with respect to what is expected of jurors at the penalty phase of a capital trial, there is the very real possibility that jurors are imposing death because they do not understand how aggravation and mitigation actually work. Further, given their tendency to assume courts have the final word, they assume a court will review their decision and “fix it” if they make an error.

Juror confusion over mitigation, unfortunately, is not unusual, both generally and in Kentucky. More than 79% of former Kentucky capital jurors did not understand that mitigation evidence does not have to be proven beyond a reasonable doubt or found by a unanimous jury, and an additional 15% did not know what the standard for mitigation was.^{FN64} At least two death sentences in Kentucky were reversed because of a failure to properly instruct the jury that mitigating factors do not have to be found unanimously by the jury.^{FN65} These numbers are consistent with national studies showing that, where jurors recognized the existence of mitigating factors, they did not know “what the law allows, or requires, them to do with such evidence.”^{FN66}

Capital jurors in Kentucky also misunderstand aggravation. More than 15% of interviewed Kentucky capital jurors did not understand that aggravating circumstances have to be found beyond a reasonable doubt.^{FN67} Likewise, at least one jury was not told that all jurors have to agree on which aggravating factor counsels in favor of death.^{FN68} In interviews conducted in several states, a substantial number of capital jurors reported that the wording of judicial instructions misled them into believing that they must sentence the defendant to death once they found the presence of a statutory aggravating circumstance.^{FN69} In Kentucky, a recent study found that more than 40% of former capital jurors believed the law required them to impose the death penalty if evidence proved that the defendant’s conduct was heinous, vile, or depraved, or if they believed the defendant would be dangerous in the future.^{FN70} In other words, those jurors believe that the presence of such characteristics is sufficient in and of itself to require imposition of the death penalty.^{FN71} Aggravating and mitigating factors were nowhere in their decision-making process. Proof of a particularly gruesome act, in these jurors’ minds, meant the death penalty must be imposed.

Part of the problem is poorly worded and confusing jury instructions. Analyzing Kentucky’s jury instructions for readability, Professor Sandys found that most of the jury instructions relevant to death sentencing require more than a college education to understand. Such a finding is striking in a state where approximately 20% of the population has a college degree.^{FN72} Similarly, Sandys found that ease of reading was revealingly low, usually ranging between 30 and 40, but going as low as 15 on a scale of 1-100, with 60-70 being the ideal.^{FN73}

Yet, the Supreme Court has upheld similar instructions on two occasions. In a 1998 case reminiscent of Kentucky’s cases addressing the issue of mitigation, the state of Virginia had an instruction indicating that aggravating factors must be proven beyond a reasonable doubt before death could be imposed.^{FN74} But the instruction was silent on the subject of mitigating factors, and no other mitigation instruction was provided. The Supreme Court found that Virginia had no affirmative

obligation to instruct on mitigation and that the mere absence of such an instruction was not error, or a denial of the authority to consider mitigating evidence.FN75 Even two years later when another Virginia jury sent a note to the trial judge expressing confusion over this instruction by inquiring whether a finding of guilt on one count made it their “duty as a jury to *issue* the death penalty,” the Court found the Constitution required “nothing more” than the judge repeat the instruction to the jury.FN76

Prosecutorial comments that draw on instructions telling the jury their sentencing decision is “only a recommendation” likely do play a role in helping jurors minimize their responsibility for their decision to impose death. In a study of Indiana jurors who were instructed by the judge that their verdict was “only a recommendation,” most jurors specifically remembered that portion of the judge’s instruction.FN77 In fact one juror took it so far as to deny having played any role in the defendant’s sentencing once the trial was over.FN78 The reality is that she recommended a death sentence, and the defendant received a death sentence from the trial judge.FN79 Other jurors used the idea that the jury’s sentence was just a recommendation to convince holdout jurors to make a decision.FN80

When jurors are confused about their basic role, it is easy for them to fall back on the presumption that “the law” requires whatever sentence they impose, and if they are wrong, a court will step in because their decision is only a suggestion that courts do not have to endorse. The presence of unclear and/or confusing jury instructions only exacerbates the problem.

The Difficulty in Humanizing Capital Defendants at a Bifurcated Hearing

Jurors struggle with aggravation and mitigation, causing them to further abdicate their role as decision-makers in capital trials. As one recent commentator noted,

[D]ehumanization during the fact-finding phase within a capital trial is predominantly established through procedural instrumentalities that unleash negative emotions through expressions of fear and outrage. Often it acts as a bulwark against positive emotions of empathy and compassion that the defense attempts to introduce in the later phase of the trial to humanize the defendant. Thus, process instrumentalities of the death penalty may permanently disable the humanization process.FN81

During the trial proceedings, “the prosecutor must portray in a vivid and compelling way, the circumstances and nature of the killing.”FN82 A prosecutor who does her job well portrays the pain and violence of the event in a way that brings it emotionally home to jurors, and jurors have an obligation to view the graphic representations of such pain and violence or else they are abdicating their role as jurors.FN83 As such, the government starts creating moral outrage around a “story of monstrosity” before the trial so that by the time of sentencing, that individual is completely “devoid of personhood and stripped of humanity.”FN84 Against this backdrop, mitigation evidence can barely begin to enter into a juror’s consciousness.FN85

Empirical evidence backs up the social science. In a study of capital juries from Kentucky, a substantial proportion (about 66%) of jurors decided the sentence during the guilt phase, even before hearing evidence regarding aggravating and mitigating factors.FN86 Of those who had reached a sentencing preference prior to the penalty phase of the trial, 70% were “absolutely convinced” of their penalty preference before hearing any evidence as to the appropriate sentence, and an additional 25% were “pretty sure.”FN87 Substantially more of those jurors who had reached a

decision on sentencing prior to the penalty phase were inclined to believe death was the appropriate penalty rather than life.FN88 Those jurors who ultimately changed their vote from death to life primarily did so out of a desire to avoid a retrial,FN89 and those who went from life to death expressed reluctance based on personal beliefs.FN90 Mitigating factors were not generally considered in either instance.FN91 As Professor Sandys, who has conducted numerous studies of Kentucky capital juries remarked upon reviewing this evidence, “If this is true, then the guilt phase of the trial tilts jurors’ penalty preferences toward death.”FN92

Such a result should not be surprising. The manner in which bifurcated capital trials operate makes the jury’s ability to consider mitigating evidence difficult, even if jurors are abundantly clear what the law requires. Due to the post-*Gregg* manifestation of the death penalty, most courts have adopted a scheme where the jury first considers the issue of guilt, and then, in a separate proceeding, the same jury considers the issue of punishment. Inevitably, for the jury to even be considering death at the penalty phase, the jury already has found an aggravating circumstance, as most aggravating circumstances mirror those the jury considers in determining whether the defendant is guilty of a capital crime.FN93 Even in the best of circumstances, humanizing a defendant to a jury who has just found the defendant guilty of a capital crime after hearing in excruciating detail about that crime is an uphill battle.

Linking back to the issue of jury instructions, the structure of capital penalty hearings also means that, as a result of the jury finding statutory aggravating factors at the guilt phase, those being presented in the penalty phase are not being considered in a manner most would hope, and, at the very least, not consistent with Supreme Court precedent.FN94 Mitigating circumstances get very little deliberation. One study revealed that many former capital jurors could not recall the mitigating evidence that was presented in the penalty phase, even when prompted, and those that could believed that such evidence was irrelevant.FN95

Given the current set-up, even if jurors are clear as to what the law requires for mitigating and aggravating evidence, there is a significant question as to whether jurors could truly satisfy the expectations of the *Caldwell* Court. Evidence seems to support the view that undermining jurors’ sense of responsibility causes them to take their sentencing duty less seriously, and often results in them failing to carefully deliberate the evidence according to the law. The result is that “defendants may be getting sentenced to death without the benefit of a jury determination that they are, in fact, death-eligible.”FN96

How To Help Jurors Accept Moral Responsibility For Their Decisions

Since *Caldwell*, both Kentucky and federal courts appear to have modified their expectations of capital jurors, moving away from the focus on moral responsibility and particularized justice, and focusing, instead, on consistency.FN97 Increasingly, jurors seem to be simply lending facial legitimacy to the process.FN98 Showing mercy or even acknowledging a defendant’s humanity no longer appears to be our expectation or hope for capital jurors, and capital jurors likely are relieved to give up that role as the community conscience.

This Essay highlights one reason to second guess that shift. The accumulated empirical evidence supports the assumptions on which the *Caldwell* decision was based. Jurors do, in fact, try to minimize their role in capital sentencing decisions, which does reduce their feeling of responsibility for that decision. Prosecutors and judges who highlight and try to downplay the jury’s influence on a capital defendant’s penalty encourage the jury to further abdicate their decision-making function, a problem that is only exacerbated by confusing and unclear instructions on evidence of mitigation

and aggravation. The post-*Gregg* bifurcated trial process further removes jurors from the “awesome responsibility” of being the community’s moral compass.

Many scholars have called on the Supreme Court to rethink the procedures meant to ensure that capital punishment is not imposed in an arbitrary and capricious manner. That chorus is joined here by another voice. Even if the Supreme Court does not advance such a move, the state legislature and/or the Kentucky Supreme Court could implement such changes. Swearing in a second jury to consider the penalty decision, separate and distinct from the guilt-phase jury, might be one way to alleviate the inherent bias that comes from a jury who has already decided aggravation and has made up its mind prior to even hearing evidence on aggravating and mitigating factors. Although it might add some clunkiness, as well as additional time and cost, to the proceedings, when a decision as weighty as someone’s life is on the line, the additional administrative burdens are quite minimal.

Kentucky should also consider amending its statute so the jury’s decision is presumed to be reliable and a judge can change that decision only in certain extraordinary circumstances. Jurors minimize their role in part because the law is confusing; it tells jurors that they are only recommending a sentence, but also tells them they are to “fix” the sentence. At the same time, the law permits judges to impose a different sentence after the jury has fixed it. Although it is this author’s view that automatic state Supreme Court review of death penalty cases should remain, especially in light of the high error rate, the jury will only truly feel a sense of responsibility if everyone in the courtroom knows and believes that the jury plays that sentencing role. Prosecutors and judges would not be able to downplay juror’s roles, either explicitly or implicitly, if jurors truly are responsible for that decision.

There also needs to be a way of communicating that juror fears of someone being out on the street shortly after receiving a life sentence are unrealistic. At the very least, voir dire should be encouraged on this topic and jury instructions amended to make sure the jury’s understandings are accurate. The Supreme Court has been clear that if the prosecution asks for execution based on a defendant’s future dangerousness, the judge must instruct the jurors that the defendant would not be eligible for parole if they authorize a life sentence.^{FN99} Rather than responding reactively, informing the jury of this fact up front might be one way of addressing the issue.

Conclusion

The Court’s death penalty jurisprudence fails to note one of the most basic reasons why jurors can relatively easily assign responsibility elsewhere: those who authorize the death penalty are inherently removed from the ultimate result. They are never the one to personally carry out, or even observe, the execution they authorize.^{FN100} Even in the best of scenarios, then, juries are inevitably distant from the repercussions of the most significant ramifications of their decision. The graphic reality of the pain inflicted through the execution process is never laid out before the jurors who are tasked with authorizing the death of another.

Given this reality, if jurors are going to be tasked with the “awesome responsibility” of deciding another person’s fate, they need to have an intimate understanding of the full panoply of realities surrounding that decision. The level of discomfort jurors feel in making this decision, even without awareness of the granular details of actually putting someone to death, ultimately provides another reason to reconsider permitting such a punishment.

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FN2. Am. Bar Ass'n, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report, at xii (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_ky_report.authcheckdam.pdf.

FN3. Robert C. LaFoundation et al., Nat'l Ctr. for State Cts., Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads 1 (2010), *available at* <http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/ewsc-2008-online.ashx>. (last viewed Jan. 8, 2014).

FN4. See *Thomas v. Commonwealth*, 864 S.W.2d 252, 260–61 (Ky. 1993); *Clark v. Commonwealth*, 833 S.W.2d 793, 795–96 (Ky. 1991); *Dean v. Commonwealth*, 777 S.W.2d 900, 906–07 (Ky. 1989); *Sanborn v. Commonwealth*, 754 S.W.2d 534, 546 (Ky. 1988); *Tamme v. Commonwealth*, 759 S.W.2d 51, 52–53 (Ky. 1988); *Holland v. Commonwealth*, 703 S.W.2d 876, 880 (Ky. 1985); *James v. Commonwealth*, 703 S.W.2d 876, 880 (Ky. 1985); *Ward v. Commonwealth*, 695 S.W.2d 404, 407–08 (Ky. 1985); *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky. 1984). *But cf.* *McClellan v. Commonwealth*, 715 S.W.2d 464, 472 (Ky. 1986) (finding no error as the idea of jury recommendation was not sufficiently prevalent to convey the message to the jury that their decision is not final, but is only a recommendation).

FN5. *Gregg v. Georgia*, 428 U.S. 153, 191–95 (1976).

FN6. *Id.* at 162–66.

FN7. *Id.* at 181.

FN8. Joseph L. Hoffmann, Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases, 70 Ind. L.J. 1137, 1138 (1995).

FN9. Craig Haney et al., Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death, J. Soc. Issues, Summer 1994, at 149, 149.

FN10. *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985).

FN11. *Id.* at 324.

FN12. *Id.*

FN13. *Id.* at 325–26.

FN14. *Id.* at 329.

FN15. *McGautha v. California*, 402 U.S. 183, 208 (1971).

FN16. *Caldwell*, 472 U.S. at 329–30 (“[T]his Court’s Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as a serious one of determining whether a specific

human being should die at the hands of the State.... Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an ‘awesome responsibility’ has allowed this Court to view sentence discretion as consistent with – and indeed indispensable to – the Eighth Amendment[.]....”).

FN17. *Id.*

FN18. *Id.* at 329. See also Jeffrey Abramson, Death-Is-Different Jurisprudence and the Role of the Capital Jury, 2 Ohio St. J. Crim. L. 117, 128–29 (2004).

FN19. *Caldwell*, 472 U.S. at 341.

FN20. *Id.* at 333.

FN21. *Id.* at 330.

FN22. Michael A. Mello, Taking *Caldwell v. Mississippi* Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury, 30 B.C. L. Rev. 283, 315 (1989).

FN23. Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 Buff. L. Rev. 339, 342 (1996).

FN24. *Id.* at 341; Ross Kleinstuber, “Only a Recommendation”: How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors’ Feelings of Responsibility, 19 Widener L. Rev. 321, 331 (2013).

FN25. William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 Ind. L.J. 1043, 1093–95 (1995).

FN26. See e.g., Eisenberg et al., *supra* note 23, at 352, 356; Austin Sarat, Violence, Representation and Responsibility in Capital Trials: The View from the Jury, 70 Ind. L.J. 1103, 1130 (1995).

FN27. Eisenberg et al., *supra* note 23, at 358–59; Hoffmann, *supra* note 8, at 1152–56; William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 41 (1988).

FN28. Bowers, *supra* note 25, at 1094.

FN29. Kleinstuber, *supra* note 24, at 332.

FN30. See Sarat, *supra* note 26, at 1130.

FN31. Bowers, *supra* note 25, at 1095.

FN32. Kleinstuber, *supra* note 24, at 334.

FN33. Ky. Rev. Stat. Ann. § 532.025(1)(b) (2012).

FN34. Ky. Rev. Stat. Ann. § 532.075 (2012) (“Whenever the death penalty is imposed for a capital offense, and upon the judgment becoming final in the Circuit Court, the sentence shall be reviewed on the record by the Supreme Court.”)

FN35. See, e.g., *Romano v. Oklahoma*, 512 U.S. 1, 8–9 (1994) (“[A] defendant necessarily must show that remarks to the jury improperly described the role assigned to the jury by local law”) (citation omitted); *Slaughter v. Parker*, 450 F.3d 224, 240–41 (6th Cir. 2006) (finding that a Kentucky judge who used, but did not make “profligate use” of, the word “recommend” in jury instructions did not err, as technical violations of *Caldwell* rule do not constitute reversible error).

FN36. Ky. Rev. Stat. Ann. § 532.025(3) (2012). This, of course, presumes the jury is the decision-maker at the penalty phase of trial. Some defendants waive their right to have a jury decide their fate, in which case a judge makes this determination.

FN37. Those states are Alabama, Florida and Delaware. Alabama’s override provision has been in the news recently after the Supreme Court denied certiorari in a case challenging this provision. See, e.g., Adam Liptak, *Judges in Alabama Retain the Right to Override Their Juries in Capital Sentencing*, N.Y. Times, A15 (Nov. 19, 2013), available at http://www.nytimes.com/2013/11/19/us/alabama-judges-retain-the-right-to-override-juries-in-capital-sentencing.html?_r=0. In Alabama, of the 111 times a judge has overridden a jury’s capital penalty verdict, 91% of the time, the judge has overridden a jury’s life sentence and imposed a death sentence. See Equal Justice Initiative, *Updated List of Alabama Overrides*, available at http://www.eji.org/files/12-16-13%20Updated%20Override%20List_0.pdf (last updated Dec. 16, 2013).

According to Justice Sotomayor’s opinion dissenting from the majority decision to deny certiorari, in 27 of 32 states with the death penalty, the jury’s decision to impose a life sentence cannot be disturbed by the trial judge. *Woodward v. Alabama*, 134 S. Ct. 405, 405 (No. 13-5380, Nov. 18, 2013) (Sotomayor, J. dissenting). Justice Sotomayor noted, “[i]n the last decade, Alabama has been the only State in which judges have imposed the death penalty in the face of contrary jury verdicts.” *Id.*

FN38. Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 812 (2011) (discussing the difficulty of getting information in these cases).

FN39. Since 1976, Alabama judges have overridden death sentences authorized by juries in favor of life sentences 10/111 times. See Equal Justice Initiative, *supra* note 37. Florida judges have overridden death to life sentences in ninety-one cases between 1972 and 2011, approximately two per year, and Indiana judges have changed death to life sentences in only nine cases since 1984. Radelet, *supra* note 38, at 818 tbl. 2, 820–21 tbl. 4 & 6, 822 tbl. 7.

FN40. Radelet, *supra* note 38, at 813.

FN41. *Id.* at 814.

FN42. Ky. Rev. Stat. Ann. § 532.025(1)(b) (2012).

FN43. *E.g.*, *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994).

FN44. *Stark v. Commonwealth*, No. 2005-SC-000332-MR, 2007 WL 2404453, at *8 (Ky. Aug. 23, 2007).

FN45. *Id.* (quoting *Tamme v. Commonwealth*, 759 S.W.2d 51, 52 (Ky. 1988)).

FN46. *Grooms v. Commonwealth*, 756 S.W.2d 131, 141–42 (Ky. 1988).

FN47. 1 W. Cooper & D. Cetrulo, *Kentucky Instructions to Juries* § 12.04A (5th ed. 2010).

FN48. Eisenberg et al., *supra* note 23, at 371.

FN49. *Id.* Kentucky has only had three women sentenced to death since 1976, when the death penalty was reinstated. Two of them had their death sentences overturned on appeal, See *Caudill v. Commonwealth*, 120 S.W. 3d 635, 648 (Ky. 2003) (affirming death sentence); *Foster v. Commonwealth*, 827 S.W.2d 670, 672, 683 (Ky. 1991) (reversing death sentence); *O’Bryan v. Commonwealth*, 634 S.W.2d 153, 154 (Ky. 1982) (same).

FN50. Eisenberg et al., *supra* note 23, at 371–72.

FN51. *Id.*; see also Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1555 (1998).

FN52. Eisenberg et al., *supra* note 23, at 371.

FN53. See *id.* at 353, 377.

FN54. Sarat, *supra* note 26, at 1130.

FN55. See *e.g.*, Kleinstuber, *supra* note 24, at 331 (footnote omitted); Bowers, *supra* note 25, at 1093–95; William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 74–75 (2003).

FN56. Kleinstuber, *supra* note 24, at 331.

FN57. Hoffmann, *supra* note 8, at 1138 (emphasis in original).

FN58. Marla Sandys, Assoc. Prof., Dep’t of Crim. Just., Indiana Univ., Remarks at The Second Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky: What Kentucky Capital Jurors Misunderstand (Nov. 15, 2013). See also Sarat, *supra* note 26, at 1131–32 (explaining that Georgia jurors in a capital case were “deeply concerned” with the possibility that defendant might someday be back on the streets, thus each voted for death out of fear that otherwise, he would be out threatening innocent people).

FN59. Sandys, *supra* note 58. Again, these results appear consistent with other state studies. See, *e.g.*, Eisenberg, *supra* note 23, at 363 (explaining that 70% of former South Carolina capital jurors believe that “less than half” or “very few” death-sentenced defendants will ever be executed).

FN60. See Sarat, *supra* note 26, at 1132.

FN61. Eisenberg et al., *supra* note 23, at 341.

FN62. Caldwell, 472 U.S. at 331.

FN63. See, e.g., Abramson, *supra* note 18, at 135–36; Sandys, *supra* note 58.

FN64. Sandys, *supra* note 58. Sixty-eight percent of former capital jurors in Kentucky believed mitigation evidence needed to be proven beyond a reasonable doubt, despite the fact that the actual standard is preponderance of the evidence, and 11% thought the jury had to be unanimous in its decision as mitigating factors. Fifteen percent of jurors did not know the standards one way or the other.

FN65. See Woodall v. Commonwealth, No. 5:06CV-P216-R, 2009 WL 464939, at *14, *44 (W.D. Ky. Feb. 24, 2009); Smith v. Commonwealth, 845 S.W.2d 534, 540 (Ky. 1993). *But see* Gall v. Commonwealth, 607 S.W.2d 97, 113–14 (Ky. 1980) (not a basis for reversal).

FN66. Abramson, *supra* note 18, at 135 (quoting Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 Brook. L. Rev. 1011, 1043 (2001)).

FN67. Bowers & Foglia, *supra* note 55, at 68.

FN68. See St. Clair v. Commonwealth, 319 S.W.3d 300, 303–04 (Ky. 2010).

FN69. Abramson, *supra* note 18, at 135; Bentele & Bowers, *supra* note 66, at 1031–38; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 10 (1993).

FN70. Sandys, *supra* note 58. This finding has been replicated in a multi-state study. See Bowers, *supra* note 25, at 1091 tbl. 7.

FN71. A survey of former capital jurors in Delaware revealed similar findings. More than 91% indicated that if certain conditions are met, they believe the law requires a death sentence. Kleinstuber, *supra* note 24, at 332.

FN72. Sandys, *supra* note 58.

FN73. *Id.*

FN74. Buchanan v. Angelone, 522 U.S. 269, 272 n.1 (1998).

FN75. *Id.* at 277–79.

FN76. Weeks v. Angelone, 528 U.S. 225, 229, 234 (2000) (emphasis in original).

FN77. Hoffmann, *supra* note 8, at 1147.

FN78. *Id.*

FN79. *Id.*

FN80. *Id.* at 1150.

FN81. Dr. Saby Ghoshray, Capital Jury Decision Making: Looking Through the Prism of Social Conformity and Seduction to Symmetry, 67 U. Miami L. Rev. 477, 493–94 (2013).

FN82. Sarat, *supra* note 26, at 1122.

FN83. *Id.* at 1126.

FN84. Ghoshray, *supra* note 81, at 495.

FN85. *Id.* at 496.

FN86. Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 Ind. L.J. 1183, 1193 (1995). These findings are consistent with results found outside Kentucky, which showed that “a sizeable number of jurors recall that in deciding guilt, there was explicit discussion of what the defendant’s punishment would or should be.” Bowers, *supra* note 25, at 1088.

FN87. Sandys, *supra* note 86, at 1194. A similar study of Delaware jurors found that 60% had made up their mind on punishment before the penalty phase began. Kleinstuber, *supra* note 24, at 331–32.

FN88. Sandys, *supra* note 86, at 1191–92.

FN89. *Id.* at 1207.

FN90. *Id.* at 1220.

FN91. *Id.* at 1207.

FN92. *Id.* at 1193.

FN93. Abramson, *supra* note 18, at 150–51. *See also* Kleinstuber, *supra* note 24, at 331 (seven of eight cases reviewed involved statutory aggravating factors that were found as a matter of law in the guilty phase).

FN94. Kleinstuber, *supra* note 24, at 331; *Ring v. Arizona*, 536 U.S. 584, (2002).

FN95. Kleinstuber, *supra* note 24, at 332.

FN96. *Id.* at 323.

FN97. Abramson, *supra* note 18, at 117, 120–21 (“[A]t one time, the Court’s jurisprudence sought to ensure that juries strive for moral consistency, while still exercising moral mercy when deciding who will be sentenced to death.”); Sarat, *supra* note 26, at 1115.

FN98. See, e.g., Abramson, *supra* note 18, at 117.

FN99. See, e.g., Kelly v. South Carolina, 534 U.S. 246, 248 (2002); Shafer v. South Carolina, 532 U.S. 36, 51 (2001).

FN100. Sarat, *supra* note 26, at 1119–20.